

FAX COVER SHEET

FAX NUMBER 15712734260

FROM Greg Phillips

DATE 2008-01-08 17:36:40 GMT

RE Answer to Opposition 91180535

COVER MESSAGE

Ms. Campbell,

As I indicated on the phone this morning, the attached Answer, including Certificates of Service and Mailing, was mailed First Class via the US Postal Service on December 12, 2007 to both the Trademark Trial and Appeal Board, PO Box 1451, Alexandria, VA 22313-1451 and to HARVEY SISKIND LLP, D. PETER HARVEY (SBN 55712), Four Embarcadero Center, 39th Floor, San Francisco, CA 94111. Note that the TTAB address used was not the one on the Web but a replacement given to me on the telephone on 12/12/07 by Cheryl Butler (Interlocutory Attorney on Opposition 91180534 which was subsequently replaced by 91180535).

The mailed copies were signed. The attached is directly from the source file (so unsigned). Greg Phillips, CEO, is traveling until Friday at which time I could have him sign another copy and FAX that if necessary.

Please confirm you have received this document and let me know if any further action is required by us.

Thank you,

Greg Felton

Chief Operating Officer

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UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 78551627
for the Mark of "WIMAX IN A BOX"
Filed on January 21, 2005
Published for Opposition in the Official Gazette of May 8, 2007

WIMAX FORUM, a California Corporation)

Opposer,)

v.)

AIRTEGRITY WIRELESS, INC., a Nevada Corporation)

Applicant.)

Proceeding No. 91180535

supersedes

Proceeding No 91180534

ANSWER

COMES NOW the Applicant, AirTegrity Wireless, Inc. ("Applicant"), and files its Answer and Affirmative Defenses to Opposer, WiMAX Forum's ("Opposer") Notice of Opposition ("Notice of Opposition"), as follows:

1. Applicant is without sufficient knowledge to form a belief as to the allegations concerning the Opposer's timing, validity, and exclusive right to use the "WIMAX FORUM" Mark contained in paragraph 1 of the Notice of Opposition, and therefore denies same. Applicant denies the parties' respective marks are similar. Applicant denies the nature of the parties' respective goods and services are similar. Therefore, the Applicant denies the likelihood of confusion, mistake, or deception as to source, sponsorship, or affiliation.
2. Applicant is without sufficient knowledge to form a belief as to the allegations concerning the Opposer's timing, validity, and exclusive right to use the "WIMAX FORUM CERTIFIED" Mark contained in paragraph 2 of the Notice of Opposition, and therefore denies same. Applicant denies the Opposer's application "has priority over the Applicant's application" insofar as they

are not in conflict. Applicant denies the parties' respective marks are similar. Applicant denies the nature of the parties' respective goods and services are similar. Therefore, the Applicant denies the likelihood of confusion, mistake, or deception as to source, sponsorship, or affiliation.

3. Applicant is without sufficient knowledge to form a belief as to the allegations concerning the Opposer's rights to the two Marks noted above contained in paragraph 3 of the Notice of Opposition, and therefore denies same. The applicant denies the Opposer established rights in "other marks that consist of or include WIMAX" that are pertinent as applications for all of the Opposer's other Marks were filed after the Applicant's. Applicant denies that there would be confusion between the two Marks for which the Opposer had filed at the time of the Applicant's Application and the Applicant's Mark.

AFFIRMATIVE DEFENSES

1. The original application for Word Mark WIMAX, U.S. Serial Number 78476620, was filed August 31, 2004 not by the Opposer but by Bandwidth.com, Inc. This Word Mark was subsequently abandoned November 8, 2005.
2. At the time of the Applicant's filing, January 21, 2005, Opposer had filed only 2 Word Mark applications, both containing the words "WIMAX FORUM" (one "WIMAX FORUM" and the other "WIMAX FORUM CERTIFIED").
3. Neither the Applicant's Word Mark WIMAX IN A BOX nor the Applicant's application to the U.S. Patent and Trademark Office contains any reference to a FORUM. Likewise, there is no graphical similarity between the Opposer's Marks and the Applicant's Marks (neither in U.S. Patent and Trademark Office documentation nor in the market).
4. WIMAX, the only common word between the Opposer's Marks and the Applicant's, has become a ubiquitous term. As of this date there are 28 Word Marks in the Trademark Electronic Search System (TESS), 18 of which are Live. A search of Google on this date reveals 2,810,000 references to this term.

5. On March 20 and 26, 2007, over two years after the Applicant's filing date, the Opposer filed five (5) Word Mark applications to secure the Word Mark WIMAX. The Opposer now improperly includes these to substantiate its claims that the Applicant's Mark should not be approved. This is as preposterous as the holder of the Mark "International Consumer Electronics Show" retroactively filing for Mark "Consumer Electronics" to prevent others from using this term already common in the marketplace.
6. The Opposer filed for Word Mark WIMAX CERTIFIED on January 15, 2002 and subsequently abandoned this Mark on September 10, 2006. Clearly even the Opposer makes the clear distinction between WIMAX and the WIMAX FORUM.
7. The Applicant is a corporation which manufactures hardware. The Opposer an association that offers promotion services. These are not likely confused.

WHEREFORE, Applicant prays that the Opposition be dismissed with prejudice.

Dated: December 12, 2007

Respectfully submitted,

By:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on the following via United States mail, postage prepaid, this 12th day of December, 2007:

HARVEY SISKIND LLP
D. PETER HARVEY (SBN 55712)
Four Embarcadero Center, 39th Floor
San Francisco, CA 94111

Respectfully submitted,

By: _____
Gregory W. Phillips

CERTIFICATE OF MAILING

I HEREBY CERTIFY that this correspondence is being deposited with the United States Postal Service with sufficient postage as First-class mail in an envelope addressed to the following this 12th day of December, 2007:

Commissioner for Trademarks
Trademark Trial and Appeal Board
PO Box 1451
Alexandria, VA 22313-1451

Respectfully submitted,

By: _____
Gregory W. Phillips